

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jan 27, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CARLA D.,

Plaintiff,

v.

KILOLO KIJAKAZI, ACTING  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

NO: 2:20-CV-00361-LRS

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

This case addresses both a constitutional challenge and a substantive challenge to the ALJ's decision denying Plaintiff's application for Disability Insurance Benefits (DIB). Plaintiff's constitutional challenge asks whether an unconstitutional statutory removal restriction as to the Commissioner of Social Security renders the decisions of the Administrative Law Judges void. This Court finds that, absent evidence of compensable harm to Plaintiff, the unconstitutional statutory removal restriction does not provide retrospective relief. Since Plaintiff's constitutional challenge provides no relief, the Court reviewed Plaintiff's

1 substantive challenge to the ALJ's decision and found it also does not provide  
2 relief. Therefore, the ALJ's decision is affirmed.

### 3 CASE HISTORY

4 Plaintiff Carla D.<sup>1</sup> protectively filed an application for DIB on September  
5 18, 2017, Tr. 91, alleging an onset date of April 1, 2016, Tr. 217, due to chronic  
6 back pain, lower back pain, hip bone impairment, depression, migraines, and high  
7 blood pressure, Tr. 235. Plaintiff's applications were denied initially, Tr. 122-24,  
8 and upon reconsideration, Tr. 128-34. A hearing before Administrative Law Judge  
9 Laura Valente ("ALJ") was conducted on December 17, 2019. Tr. 39-90. Plaintiff  
10 was represented by counsel and testified at the hearing. *Id.* The ALJ also took the  
11 testimony of vocational expert Alison Baldwin. *Id.* The ALJ entered an  
12 unfavorable decision on January 9, 2020. Tr. 15-33. The Appeals Council denied  
13 review on August 3, 2020. Tr. 1-6. Therefore, the ALJ's January 9, 2020 decision  
14 became the final decision of the Commissioner. The matter is now before this  
15 Court pursuant to 42 U.S.C. § 405(g). ECF No. 1.

16 The parties filed cross motions for summary judgement. ECF Nos. 15, 16.  
17 In her reply briefing, Plaintiff initially raised a constitutional challenge to the  
18 Commissioner's appointment citing a Memorandum Opinion by the Office of

---

19  
20 <sup>1</sup>In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's  
21 first name and last initial, and, subsequently, Plaintiff's first name only, throughout  
this decision.

1 Legal Counsel filed after her motion for summary judgement was filed. ECF No.  
2 17. Based on the timing of the Memorandum Opinion of the Office of Legal  
3 Counsel, this Court issued an order for additional briefing on the constitutional  
4 challenge, ECF No. 19, which the parties completed, ECF Nos. 22, 25.

5 The Court has reviewed the administrative record, the parties' initial and  
6 supplemental briefing, and is fully informed. For reasons discussed below, the  
7 Court **GRANTS** Defendant's Motion for Summary Judgment, ECF No. 16, and  
8 **DENIES** Plaintiff's Motion for Summary Judgment, ECF 15.

## 9 **CONSTITUTIONAL CHALLENGE**

10 As an initial matter, Plaintiff challenges the authority of the ALJ to enter a  
11 decision regarding Plaintiff's application. Plaintiff alleges that the President's  
12 authority to remove the Presidentially-appointed, Senate-confirmed Commissioner  
13 without good cause under 42 U.S.C. § 902(a)(3) violates that separation of powers  
14 provision of Article II. She asserts that this results in an unconstitutional  
15 appointment of the Commissioner and, because of this unconstitutional  
16 appointment, the ALJ lacked authority to render a decision on Plaintiff's  
17 application for benefits. ECF No. 17 at 4-8.

18 Plaintiff's argument is premised on two recent Supreme Court decisions,  
19 *Seila Law v. Consumer Financial Protection Board*, 140 S.Ct. 2183 (2020), and  
20 *Collins v. Yellen*, 141 S. Ct. 1761 (2021). ECF Nos. 17, 25. In these decisions, the  
21 Supreme Court held that statutory limitations on the President's ability to remove

1 the one-person head of the challenged Executive Branch agencies violated Article  
2 II separation of powers principles. *Seila Law*, 140 S.Ct. at 2204; *Collins*, 141 S.Ct.  
3 at 1784. Because the Social Security Administration is also an Executive Branch  
4 agency headed by a single individual removable “only pursuant to a finding by the  
5 President of neglect of duty or malfeasance in office,” under 42 U.S.C. § 902(a)(3),  
6 Plaintiff asserts these protections also are unconstitutional. Defendant, the Acting  
7 Commissioner of Social Security, agrees. ECF No. 22 at 2 (“The parties agree that  
8 42 U.S.C. § 902(a)(3) violates the separation of powers.”). The Department of  
9 Justice has concluded the same. *See* ECF No. 20-1 *Constitutionality of the*  
10 *Commissioner of Social Security's Tenure Protection*, 45 Op. O.L.C. – (July 8,  
11 2021).

12 Despite the consensus that 42 U.S.C. § 902(a)(3) violates the separation of  
13 powers principles in Article II, the parties disagree over whether this  
14 unconstitutional removal requirement tainted the ALJ’s authority to make a  
15 determination regarding Plaintiff’s DIB application. ECF Nos. 22, 25. Defendant  
16 makes two valid arguments in asserting that this unconstitutional removal  
17 provision did not void the ALJ’s authority to issue a decision: (1) the  
18 Commissioner at the time of the ALJ’s appointment was not subject to 42 U.S.C. §  
19 902(a)(3); and (2) even if the Commissioner at the time of the ALJ’s appointment  
20 was subject to 42 U.S.C. § 902(a)(3), Plaintiff cannot show that 42 U.S.C. §  
21 902(a)(3)’s removal restriction caused compensable harm. ECF No. 22 at 2-12.

1       First, the Commissioner at the time of the ALJ's appointment was not  
2 subject to 42 U.S.C. § 902(a)(3). Here, ALJ Laura Valente's appointment was  
3 ratified by Acting Commissioner Nancy Berryhill on July 16, 2018, and Acting  
4 Commissioner Berryhill approved the appointment as her own.<sup>2</sup> *See* S.S.R. 19-1p.  
5 By the very nature of her status as an Acting Commissioner, Berryhill was not  
6 subject to the protections of 42 U.S.C. § 902(a)(3). *See Collins*, 141 S. Ct. at 1783  
7 (Holding that the removal restriction was not extended to acting directors).  
8 Therefore, the powers deferred to the ALJ upon the July 16, 2018 appointment  
9 could not be tainted by the removal protections of 42 U.S.C. § 902(a)(3).

10       Second, even if the Commissioner at the time of the ALJ's appointment was  
11 subject to 42 U.S.C. § 902(a)(3), Plaintiff cannot show that the removal restriction  
12 caused the denial of her application for benefits. The Court in *Collins* clearly  
13 found that “[a]lthough the statute unconstitutionally limited the President's  
14 authority to *remove* the confirmed Directors, there was no constitutional defect in  
15 the statutorily prescribed method of appointment to that office. As a result, there is  
16 no reason to regard any of the actions taken by the FHFA [challenged on appeal] as

17  
18       

---

<sup>2</sup>The Court takes judicial notice of ALJ Laura Valente's appointment as an  
19 ALJ prior to the July 16, 2018 ratification of appointment. *See Neff v. Colvin*, No.  
20 1:14-CV-03090-VEB, 2015 WL 2185836, at \*1 (E.D. Wash. May 11, 2015) (“On  
21 February 13, 2013, a hearing was held before ALJ Laura Valente.”).

1 void.” 141 S. Ct. at 1787 (*emphasis* in original). Therefore, if the analysis in  
2 *Collins* is extended to the Social Security Administration, which all parties agree it  
3 does, there was no constitutional defect in the appointment of the Commissioner.  
4 Plaintiff attempts to apply the Supreme Court’s ruling in *Lucia v. SEC*, 138 S.Ct.  
5 2044 (2018), that an ALJ’s unconstitutional appointment voided her authority to  
6 issue a decision and remand to a properly appointed ALJ was required. ECF No.  
7 17 at 6. However, the Court in *Lucia* was addressing a defective appointment, not  
8 a defective removal statute. As the Supreme Court clarified, Plaintiff is required to  
9 show compensable harm was caused by the unconstitutional removal statute.  
10 *Collins*, 141 S. Ct. at 1788-89. Plaintiff alleges that she has established sufficient  
11 harm based on President Biden’s apparent delay in terminating Commissioner Saul  
12 combined with President Biden’s comments at the termination criticizing  
13 Commissioner Saul for politicizing Social Security benefits and reducing due  
14 process protections for appeals hearings. ECF No. 25 at 4-5. However, Plaintiff  
15 has not pointed to any lack of due process in this case. Therefore, she has failed to  
16 show compensable harm.

17 Defendant also raises several other reasons for the Court to deny Plaintiff’s  
18 request for a new hearing based on the constitutional challenge, including the  
19 Harmless Error Doctrine, the De Facto Officer Doctrine, the Rule of Necessity, and  
20 the Broad Prudential Considerations. ECF No. 22 at 12-19. However, the Court  
21 need not address these doctrines because Plaintiff’s constitutional challenge fails

1 on its face.

2 **SUBSTANTIVE CHALLENGE**

3 In addition to the constitutional challenge, Plaintiff raised a substantive  
4 challenge to the ALJ's decision, specifically challenging the ALJ's treatment of  
5 her symptom statements. ECF No. 15. Here, the Court found that, based on a  
6 review of the record as a whole, the ALJ's treatment of her symptom statements  
7 was supported by substantial evidence and free of harmful error.

8 **A. Background**

9 The facts of the case are set forth in the administrative hearing and  
10 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner.  
11 Only the most pertinent facts are summarized here.

12 Plaintiff was 39 years old at the alleged onset date. Tr. 217. Plaintiff  
13 completed two years of college in 2013. Tr. 236. In the fifteen years prior to the  
14 application for benefits, Plaintiff's reported a work history includes jobs as a  
15 preschool teacher and child care provider. Tr. 236, 264. At application, she stated  
16 that she stopped working on April 1, 2016, because of her conditions. Tr. 235.  
17 However, Plaintiff alleged that she was self-employed as a childcare provider from  
18 July of 2014 through April of 2017. Tr. 264. She cared for children from ages six  
19 months to five years old for ten hours a day, five days a week and was responsible  
20 for supervision of children at all times. Tr. 265, 275. Plaintiff stated that she  
21 stopped working as a childcare provider following her second back surgery in

1 April of 2017. Tr. 64.

2 **B. Standard of Review**

3 A district court's review of a final decision of the Commissioner of Social  
4 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
5 limited; the Commissioner's decision will be disturbed "only if it is not supported  
6 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
7 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a  
8 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159  
9 (quotation and citation omitted). Stated differently, substantial evidence equates to  
10 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and  
11 citation omitted). In determining whether the standard has been satisfied, a  
12 reviewing court must consider the entire record as a whole rather than searching  
13 for supporting evidence in isolation. *Id.*

14 In reviewing a denial of benefits, a district court may not substitute its  
15 judgment for that of the Commissioner. "The court will uphold the ALJ's  
16 conclusion when the evidence is susceptible to more than one rational  
17 interpretation." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).  
18 Further, a district court will not reverse an ALJ's decision on account of an error  
19 that is harmless. *Id.* An error is harmless where it is "inconsequential to the  
20 [ALJ's] ultimate nondisability determination." *Id.* (quotation and citation omitted).  
21 The party appealing the ALJ's decision generally bears the burden of establishing

1 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

2 **C. Five-Step Evaluation Process**

3 A claimant must satisfy two conditions to be considered “disabled” within  
4 the meaning of the Social Security Act. First, the claimant must be “unable to  
5 engage in any substantial gainful activity by reason of any medically determinable  
6 physical or mental impairment which can be expected to result in death or which  
7 has lasted or can be expected to last for a continuous period of not less than 12  
8 months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment must be  
9 “of such severity that he is not only unable to do his previous work[,] but cannot,  
10 considering his age, education, and work experience, engage in any other kind of  
11 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
12 423(d)(2)(A).

13 The Commissioner has established a five-step sequential analysis to  
14 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §  
15 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s  
16 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in  
17 “substantial gainful activity,” the Commissioner must find that the claimant is not  
18 disabled. 20 C.F.R. § 404.1520(b).

19 If the claimant is not engaged in substantial gainful activity, the analysis  
20 proceeds to step two. At this step, the Commissioner considers the severity of the  
21 claimant’s impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers

1 from “any impairment or combination of impairments which significantly limits  
2 [his or her] physical or mental ability to do basic work activities,” the analysis  
3 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant’s impairment  
4 does not satisfy this severity threshold, however, the Commissioner must find that  
5 the claimant is not disabled. 20 C.F.R. § 404.1520(c).

6 At step three, the Commissioner compares the claimant’s impairment to  
7 severe impairments recognized by the Commissioner to be so severe as to preclude  
8 a person from engaging in substantial gainful activity. 20 C.F.R. §  
9 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the  
10 enumerated impairments, the Commissioner must find the claimant disabled and  
11 award benefits. 20 C.F.R. § 404.1520(d).

12 If the severity of the claimant’s impairment does not meet or exceed the  
13 severity of the enumerated impairments, the Commissioner must pause to assess  
14 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),  
15 defined generally as the claimant’s ability to perform physical and mental work  
16 activities on a sustained basis despite his or her limitations, 20 C.F.R. §  
17 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

18 At step four, the Commissioner considers whether, in view of the claimant’s  
19 RFC, the claimant is capable of performing work that he or she has performed in  
20 the past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is  
21 capable of performing past relevant work, the Commissioner must find that the

1 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of  
2 performing such work, the analysis proceeds to step five.

3 At step five, the Commissioner considers whether, in view of the claimant's  
4 RFC, the claimant is capable of performing other work in the national economy.  
5 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner  
6 must also consider vocational factors such as the claimant's age,  
7 education and past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the  
8 claimant is capable of adjusting to other work, the Commissioner must find that the  
9 claimant is not disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not  
10 capable of adjusting to other work, analysis concludes with a finding that the  
11 claimant is disabled and is therefore entitled to benefits. 20 C.F.R. §  
12 404.1520(g)(1).

13 The claimant bears the burden of proof at steps one through four. *Tackett v.*  
14 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,  
15 the burden shifts to the Commissioner to establish that (1) the claimant is capable  
16 of performing other work; and (2) such work "exists in significant numbers in the  
17 national economy." 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d 386,  
18 389 (9th Cir. 2012).

19 **D. The ALJ Decision**

20 At step one, the ALJ found that Plaintiff had not engaged in substantial  
21 gainful activity since the alleged date of onset, April 1, 2016. Tr. 17.

1 At step two, the ALJ found that Plaintiff had the following severe  
2 impairments: sacroiliac joint dysfunction, status post left-side SI joint fusion;  
3 lumbar degenerative disc disease; migraine headaches; and obesity. Tr. 17.

4 At step three, the ALJ found that Plaintiff did not have an impairment or  
5 combination of impairments that met or medically equaled the severity of one of  
6 the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. Tr. 20.

7 The ALJ then found that Plaintiff had the RFC to perform light work as  
8 defined in 20 C.F.R. § 404.1567(b) with the following limitations:

9 She can lift 20 pounds occasionally and 10 pounds frequently, she can  
10 stand and/or walk for a total of two hour and sit for a total of six hours  
11 in an eight-hour workday. She can perform occasional postural  
12 activities except that balancing is unlimited and she can never climb  
13 ladders, ropes, or scaffolds. She must avoid concentrated exposure to  
extreme heat, vibration, loud noise (as a term “loud” is defined by the  
Department of Labor’s Selected Characteristics of Occupations),  
pulmonary irritants, and hazards. She can sustain concentration in two-  
hour increments with usual and customary breaks.

14 Tr. 21. At step four, the ALJ found Plaintiff could perform her past relevant work  
15 as a school social worker, tutor, and general office clerk. Tr. 31.

16 As an alternative to finding Plaintiff ineligible at step four, the ALJ made a  
17 step five determination that, considering her age, education, work experience, and  
18 RFC, there were other jobs that exist in significant numbers in the national  
19 economy that Plaintiff could perform, including addresser, final assembler, and  
20 document preparer. Tr. 32-33.

21 The ALJ found that Plaintiff had not been disabled within the meaning of the

1 Social Security Act at any time from the alleged onset date through the date of the  
2 decision. Tr. 33.

3 **E. Discussion**

4 Plaintiff challenges the ALJ's decision denying her DIB by challenging the  
5 ALJ's treatment of her symptom statements. ECF No. 15.

6 An ALJ engages in a two-step analysis when evaluating a claimant's  
7 testimony regarding subjective pain or symptoms. "First, the ALJ must determine  
8 whether the claimant has presented objective medical evidence of an underlying  
9 impairment which could reasonably be expected to produce the pain or other  
10 symptoms alleged." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). "The  
11 claimant is not required to show that his impairment could reasonably be expected  
12 to cause the severity of the symptom he has alleged; he need only show that it  
13 could reasonably have caused some degree of the symptom." *Id.*

14 Second, "[i]f the claimant meets the first test and there is no evidence of  
15 malingering, the ALJ can only reject the claimant's testimony about the severity of  
16 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the  
17 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal  
18 citations and quotations omitted).

19 The ALJ stated that Plaintiff's statements about intensity, persistence, and  
20 limiting effects of her symptoms "are not entirely consistent with the medical  
21 evidence and other evidence in the record." Tr. 22. The then ALJ gave seven

1 reasons for rejecting Plaintiff's symptom statements: (1) her providers generally  
2 found her to be in no acute distress; (2) her course of treatment was inconsistent  
3 with her allegations of migraines; (3) the objective neurological and  
4 musculoskeletal findings were not consistent with her allegations of back pain; (4)  
5 her treatment history was inconsistent with her allegations of back pain; (5) the  
6 treatment records did not support her alleged need for an assistive device; (6) her  
7 self-employment as a home-based childcare and early learning program was  
8 inconsistent with her alleged symptoms; and (7) her other daily activities were  
9 inconsistent with her alleged symptoms. Tr. 23-28.

10 The ALJ's first reason for rejecting Plaintiff's symptom statements, that her  
11 providers generally found her to be in no acute distress, is not specific, clear and  
12 convincing. An ALJ may cite inconsistencies between a claimant's testimony and  
13 the objective medical evidence in discounting the claimant's testimony. *Bray v.*  
14 *Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). However, district  
15 courts have questioned the applicability of the generic chart note of "no acute  
16 distress" to chronic conditions. *See Toni D. v. Saul*, No. 3:19-cv-820-SI, 2020 WL  
17 1923161, at \*6 (D. Or. April 21, 2020) *citing, Mitchell v. Saul*, No. 2:18-cv-01501-  
18 GMN-WGC, 2020 WL 1017907, at \*7 (D. Nev. Feb. 13, 2020) ("Moreover, the  
19 court agrees with Plaintiff that notations that Plaintiff was healthy 'appearing' and  
20 in no 'acute' distress do not distract from the findings regarding Plaintiff's chronic  
21 conditions."); *Richard F. v. Comm'r of Soc. Sec.*, No. C19-5220 JCC, 2019 WL

1 6713375, at \*7 (W.D. Wash. Dec. 10, 2019) (“Clinical findings of ‘no acute  
2 distress’ do not undermine Plaintiff’s testimony. ‘Acute’ means ‘of recent or  
3 sudden onset; contrasted with chronic.’ Oxford English Dictionary, acute (3d ed.  
4 December 2011). Plaintiff’s impairments are chronic, not acute.”). Here, the ALJ  
5 found that Plaintiff’s reported headaches, low back pain, and obesity were  
6 inconsistent with providers finding her to be in no acute distress. However, since  
7 Plaintiff suffered from chronic impairments, she would appear in no acute distress  
8 unless she was presently experiencing a headache or experiencing an acute  
9 increase in back pain. Therefore, the generic chart note of “no acute distress” is  
10 not a specific, clear and convincing reason to discount Plaintiff’s symptom  
11 testimony.

12 The second reason the ALJ provided for rejecting Plaintiff’s symptom  
13 statements, that her course of treatment was inconsistent with her allegations of  
14 migraines, is specific, clear and convincing. The ALJ found that when Plaintiff  
15 “saw her primary-care provider in March 2016, just weeks before she alleges she  
16 had to stop working due to migraines, she made no report of migraines.” Tr. 23.  
17 Here, the dates of Plaintiff’s employment are inconsistent. Plaintiff’s earning  
18 records show that she worked away from her home at the Omak School District in  
19 2014 and began working in her home in 2015. Tr. 220. She testified that she  
20 stopped working in the Omak School District in 2014 due to her migraines. Tr. 58-  
21 59. However, at application, she stated that she stopped working on April 1, 2016

1 due to all of her impairments. Tr. 217. Therefore, the ALJ's finding that the lack  
2 of complaints of migraines in March of 2016, "just weeks before she alleges she  
3 had to stop working due to migraines," does not hold the significance the ALJ  
4 found that it did because Plaintiff's testimony was that she stopped workout  
5 outside the home in 2014 because of her migraines, not 2016.

6 Despite the ALJ's misidentified date, substantial evidence supports the  
7 ALJ's determination that her course of treatment was not consistent with  
8 headaches at the rate she reported. She testified that her migraines intensified in  
9 2016 to a rate of 12 to 15 migraines a month lasting two to three days each, and  
10 that from 2017 to the date of the hearing, she was experiencing migraine symptoms  
11 "almost daily." Tr. 72; *see also* Tr. 73 ("And I always wake up with migraine.  
12 Every day I wake up with migraine."). Plaintiff was seen on June 8, 2016,  
13 complaining of a migraine that had lasted six days. Tr. 351. She was then seen on  
14 June 23, 2016, July 1, 2016, July 26, 2016, and August 16, 2016, with no  
15 complaints of migraines. Tr. 352-56, 397-404. On August 31, 2016, she again  
16 complained of migraines, but stated this felt like her typical migraine which  
17 coincide with her menstrual cycle. Tr. 356. By November of 2016, Plaintiff again  
18 reported that her migraines occurred monthly based on her menstrual cycle. Tr.  
19 360. On December 16, 2016, Plaintiff reported having a headache the day before  
20 and reported "occasional headaches." Tr. 365. On December 30, 2016, Plaintiff  
21 reported a recent increase in migraines. Tr. 405-08. In February and March of

1 2017, Plaintiff reported that diet change and medications had reduced the  
2 frequency of her headaches. Tr. 415, 420. On June 14, 2017, Plaintiff reported  
3 that her headaches were occurring three times a week or more. Tr. 374. However,  
4 in July of 2017, Plaintiff reported fewer migraines with verapamil. Tr. 424. In  
5 October of 2017, Plaintiff reported an increase in migraines when she stopped  
6 verapamil. Tr. 428. On January 4, 2018, Plaintiff reported 20 headache days a  
7 month, which was sufficient to explore Botox injections to treat her symptoms. Tr.  
8 470. She received her first Botox injection on January 31, 2018. Tr. 574. She  
9 reported to the emergency room with a migraine on February 17, 2018. Tr. 574-  
10 78. In June of 2018, Plaintiff reported that changing her diet had eliminated her  
11 migraines. Tr. 1049. In July of 2018, Plaintiff reported that she had noted a  
12 greater than 50% improvement with her migraines following her Botox injections  
13 and taking her medications. Tr. 1066. This improvement following Botox  
14 continued. Tr. 1415, 1428. In June of 2019 she stopped the amitriptyline and  
15 experienced a migraine, but her migraines improved after she began taking the  
16 medication again. Tr. 1437. By October of 2019, she reported an increase in  
17 migraines, but these were relieved with medication. Tr. 1445.

18 The Court acknowledges that symptoms wax and wane over time and the  
19 Ninth Circuit has cautioned ALJs against inferring that improvement makes the  
20 Plaintiffs statements unreliable without a doctor or medical expert opining that the  
21 claimant's improvement results in an ability to return to work. *Garrison v. Colvin*,

1 753 F.3d 995, 1017-18 (9th Cir. 2014). However, Plaintiff's testimony that she  
2 experiences migraines "almost everyday" at the time of the hearing is not  
3 consistent with her statements that her migraine frequency reduced by over 50  
4 percent following the Botox injections or that her migraine symptoms are resolved  
5 with medications. Prior to the Botox injections, Plaintiff was experiencing 20  
6 headache days a month, which reduced by 50% after Botox injections. Therefore,  
7 Plaintiff's testimony at the hearing of daily migraines is not supported by her own  
8 reports during her course of treatment. In considering a claimant's symptom  
9 statements, the ALJ may consider a claimant's inconsistent statements. *Smolen v.*  
10 *Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). Therefore, this is a specific, clear and  
11 convincing reason to reject Plaintiff's testimony regarding the frequency and  
12 intensity of her symptoms.

13 The third reason the ALJ provided for rejecting Plaintiff's symptom  
14 statements, that the objective neurological and musculoskeletal findings are not  
15 consistent with her allegations of back pain, is specific, clear and convincing.  
16 While it cannot serve as the only reason for rejecting a claimant's testimony,  
17 objective medical evidence is a "relevant factor in determining the severity of the  
18 claimant's pain and its disabling effects." *Rollins v. Massanari*, 261 F.3d 853, 857  
19 (9th Cir. 2001). Here, the ALJ then cited numerous normal findings on  
20 examination throughout the record. Tr. 24. Plaintiff likewise cites to evidence in  
21 the record asserting that it supports her complaints. ECF No. 15 at 8-9. "The court

1 will uphold the ALJ's conclusion when the evidence is susceptible to more than  
2 one rational interpretation." *Tommasetti*, 533 F.3d at 1038. Here, the normal  
3 results on examinations include normal strength, Tr. 352, 364, 368, 387, 613, 1338,  
4 normal sensation, Tr. 364, 387, 614, 1338, 1361, 1370, normal range of motion, Tr.  
5 368, 1338, 1370 and a negative straight-leg rising test, Tr. 365. Additionally, an  
6 electromyogram of her right leg was normal with no evidence of radiculopathy,  
7 plexopathy, or neuropathy. Tr. 1199. Therefore, the objective evidence supports  
8 the ALJ's determination that Plaintiff's reported symptoms and limitations  
9 resulting from her spinal impairments are not supported by the objective medical  
10 evidence. As such, this meets the specific, clear and convincing standard.

11 The fourth reason the ALJ provided for rejecting Plaintiff's symptom  
12 statements, that her treatment history was inconsistent with her allegations of back  
13 pain, is specific, clear and convincing. Much like the reports of Plaintiff's  
14 migraines, the records addressing her low back pain demonstrate a waxing and  
15 waning of symptoms, which the ALJ summarized in her decision. Tr. 24-26.  
16 However, the periods of waxing symptoms resulting in significant limitation were  
17 associated with her surgeries in April of 2017 and January of 2018. Again, these  
18 records indicated Plaintiff's reports to her providers were inconsistent with the  
19 symptoms reported to the ALJ. At the hearing, Plaintiff testified that she cannot  
20 stand for more than ten minutes, and she cannot walk more than two blocks  
21 without being unable to walk the next day. Tr. 79. However, she regained the

1 ability to ambulate normally following the second surgery and stated that she could  
2 walk a mile before needing any assistance device within six months of the second  
3 surgery, Tr. 1049. This is inconsistent with her testimony of being unable to walk  
4 two blocks. *See Smolen*, 80 F.3d at 1284 (the ALJ may rely on a claimant's  
5 inconsistent statements when addressing her symptom statements). Therefore, this  
6 meets the specific, clear and convincing standard.

7 The fifth reason the ALJ provided for rejecting Plaintiff's symptom  
8 statements, that the treatment records do not support her alleged need for an  
9 assistant device, is specific, clear and convincing. Plaintiff reported that she  
10 required the use of a wheelchair prior to giving birth to her second child and  
11 required the use of a walker after the birth. Tr. 46. She then required the use of a  
12 wheelchair for three months followed by three months with a walker following her  
13 first surgery. Tr. 47. She then required the use of a wheelchair and walker from  
14 her second surgery until July of 2018. Tr. 47. However, this testimony was not  
15 supported in the record. Less than one month following the first surgery, Plaintiff  
16 reported that she was using crutches for ambulation primarily and only  
17 occasionally used the wheelchair. Tr. 373. Less than two months following the  
18 first surgery, Plaintiff attended an appointment without her crutches "because she  
19 feels she has too much going on in her life to be restricted to using assistance  
20 devices." Tr. 374. Only nine days after her second surgery, Plaintiff was using a  
21 cane to ambulate at her psychological evaluation. Tr. 524. In June of 2018,

1 Plaintiff reported that she could walk a mile before requiring a walker. Tr. 1049.  
2 These observations in the record are not consistent with requiring a wheelchair and  
3 walker as Plaintiff reported at the hearing. Therefore, the ALJ's reason meets the  
4 specific and legitimate standard.

5 The sixth reason the ALJ provided for rejecting Plaintiff's symptom  
6 statements, that her self-employment as a home-based childcare and early learning  
7 program was inconsistent with her alleged symptoms, is specific, clear and  
8 convincing. Generally, a claimant's ability to work can be considered in assessing  
9 her symptom statements. *Bray*, 554 F.3d at 1227. Here, Plaintiff testified that she  
10 ran a home childcare and early learning program for children requiring special  
11 needs from 2014 to the date of her surgery in 2017. Tr. 59-64. She ran the  
12 program from 7:30 am to 5 pm and had six children in her care, including her own  
13 two children. Tr. 63-64. This shows that Plaintiff continued to work in her home  
14 after the April 1, 2016, alleged onset date. The ALJ found that this work activity  
15 was inconsistent with her allegations, including the inability to lift over ten pounds,  
16 the inability to stand for more than 10 minutes, and the requirement that she retreat  
17 to a dark room for her headaches for hours at a time. Tr. 28. Therefore, this  
18 reason meets the specific, clear and convincing standard.

19 The seventh reason the ALJ provided for rejecting Plaintiff's symptom  
20 statements, that her other daily activities were inconsistent with her alleged  
21 symptoms, is not specific, clear and convincing. Here, the ALJ found that

1 Plaintiff's abilities to drive a car, listen to audio books, attend church, do  
2 missionary work, and shop in stores were inconsistent with her reported  
3 limitations. Tr. 28. However, the Ninth Circuit has warned ALJs against using  
4 simple household activities against a person when evaluating their testimony:

5 We have repeatedly warned that ALJs must be especially cautious in  
6 concluding that daily activities are inconsistent with testimony about  
7 pain, because impairments that would unquestionably preclude work  
8 and all the pressures of a workplace environment will often be  
9 consistent with doing more than merely resting in bed all day.

10 *Garrison*, 759 F.3d at 1016. The activities the ALJ identified are simple household  
11 activities that do not rise to the specific, clear and convincing standard for rejecting  
12 a claimant's symptom statements.

13 In conclusion, the ALJ provided specific, clear and convincing reasons to  
14 support her determination that Plaintiff's symptom statements were not reliable  
15 and any reasons the ALJ provided that did not meet the specific, clear and  
16 convincing standard amounts to harmless error. *Carmickle v. Comm'r, Soc. Sec.*  
17 *Admin.*, 533 F.3d 1155, 1163 (9th Cir. 2008) (upholding an adverse credibility  
18 finding where the ALJ provided four reasons to discredit the claimant, two of  
19 which were invalid); *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197  
20 (9th Cir. 2004) (affirming a credibility finding where one of several reasons was  
21 unsupported by the record); *Tommasetti*, 533 F.3d at 1038 (an error is harmless  
when "it is clear from the record that the . . . error was inconsequential to the  
ultimate nondisability determination").

## CONCLUSION

Both Plaintiff's constitutional challenge and substantive challenge are not persuasive. The Court finds that Plaintiff failed to show how the unconstitutional removal provision of 42 U.S.C. § 902(a)(3) resulted in compensable harm. Furthermore, the court finds the ALJ's decision is supported by substantial evidence and free of harmful legal error.

**ACCORDINGLY IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, ECF No. 15, is **DENIED**.
2. Defendant's Motion for Summary Judgment, ECF No. 16, is

## GRANTED.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel, enter judgment in favor of the **Defendant**, and CLOSE the file.

**DATED** January 27, 2022.

Tommy Garko

RONNIE R. SUKO  
Senior United States District Judge